

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 48)	
)	
Charged Party,)	
)	
and)	Case 19-CD-080738
)	
ICTSI OREGON, INC.,)	
)	
Charging Party,)	
)	
and)	
)	
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 8,)	
)	
Involved Party.)	

**PACIFIC MARITIME ASSOCIATION’S APPEAL OF
REGIONAL DIRECTOR’S DENIAL OF MOTION TO INTERVENE AND MOTION TO
QUASH SECTION 10(k) HEARING**

Pursuant to Section 102.26 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), Pacific Maritime Association (“PMA”) files this appeal of the Regional Director’s denial of its Motion to Intervene in this matter and its denial of the motion to quash the Section 10(k) hearing.

I. INTRODUCTION

The Hearing Officer closed a four-day Section 10(k) hearing that never should have occurred because the Board has no jurisdiction in this case under the plain language of the National Labor Relations Act. No Section 10(k) hearing should have been held because the

IBEW employees at issue are employed by the Port of Portland, a public entity, and therefore, in accordance with well-established Board precedent, are not “employees” under the Act.

PMA is the collective bargaining representative of all of the West Coast longshore employers, including the charging party in this case. PMA has interests that could not be represented by any other party, and in fact were not represented at the hearing. The Board should remedy the Hearing Officer’s clear error by allowing PMA to intervene and by quashing the proceeding in its entirety.

II. BACKGROUND

This case involves an alleged jurisdictional dispute under Section 10(k) of the National Labor Relations Act (the “Act”). PMA member ICTSI Oregon, Inc. (“ICTSI”) requested that the Board decide whether certain maintenance and repair work at Terminal 6 in Portland should be performed by IBEW employees (as required by ICTSI’s lease with the Port) or by ILWU employees (as required by the longshore collective bargaining agreement, to which ICTSI is bound). Both parties to the longshore CBA – PMA and the ILWU – moved to intervene. PMA filed a written motion to intervene and made an oral offer of proof on the first day of the hearing. (Tr. 6-9.) The Hearing Officer granted the ILWU’s motion and denied PMA’s motion, finding that PMA’s interests could be adequately represented by the other parties. (Tr. 9.) The hearing was held on May 24, 25, 29 and 30, before Hearing Officer Jessica Dietz in Portland, Oregon, without any formal participation by PMA.

III. ARGUMENT

A. PMA Is An “Interested Party”

In determining a motion to intervene, the Board considers Section 554(c) of the Administrative Procedure Act (“APA”), which provides that the “agency shall give all interested parties opportunity for ... the submission and consideration of facts, arguments, offers of

settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit” *See Camay Drilling Co.*, 239 NLRB 997, 998 (1978).

There can be no question that PMA is an “interested party” here. PMA is the multi-employer collective bargaining agent for approximately 70 members, including the stevedore companies, terminal operators, and shipping lines that employ longshore workers in Ports in California, Oregon, and Washington, including the Port of Portland. (Tr. 357-358.) As the collective bargaining agent for all of its employer-members, PMA is responsible for negotiating, administering, and enforcing the coastwide collective bargaining agreements between PMA and the ILWU and its local unions, including Involved Party, ILWU Local 8.

The Charging Party, ICTSI, is a PMA member that performs work in the Port of Portland, the location of the alleged work dispute. PMA and ILWU Local 8 are parties to the Pacific Coast Longshore Contract Document, which covers longshore work in the Port of Portland, including the maintenance and repair work that is the subject of the dispute in this case. PMA therefore plainly has a vital interest in the outcome of this proceeding and is an “interested party” under the APA. *See, e.g., Camay Drilling*, 239 NLRB at 998 (holding that trustees of union trust fund were “interested parties” under APA because they were responsible for safeguarding and administering assets of the trust fund).

B. PMA’s Interest In This Matter Cannot Be, And Has Not Been, Represented By The Other Parties

In denying PMA’s motion to intervene, the Hearing Officer, on behalf of the Regional Director, found that PMA’s interests could be represented by the other parties to this proceeding. (Tr. 9.) This conclusion was clear error and deprived PMA of any opportunity to present evidence or argument. ICTSI could not represent PMA’s interests because they have opposing views on which employees should perform the work at issue; ICTSI prefers not to violate its

lease with the Port, while PMA – ICTSI’s bargaining agent – takes the position that the work is subject to the PCLCD and must be performed by ILWU mechanics. On the other hand, the ILWU cannot represent PMA’s interests in this case because they are collective bargaining adversaries with highly dissimilar interests and members with competing goals. In particular, the ILWU’s aim is to expand and protect the union’s jurisdiction, while PMA’s interests is to protect its members’ ability to operate as efficiently and cost-effectively as possible.¹

The Regional Director also erred by finding that, to the extent PMA had relevant evidence, any party could call a PMA representative to testify at the hearing. While one PMA representative did testify at the hearing, he was not examined by PMA’s counsel. Nor did PMA’s counsel have an opportunity to cross-examine any witnesses or present any other evidence at the hearing. Indeed, as noted at the hearing, PMA’s counsel attempted to have counsel for the other parties express PMA’s position on various issues, but those attempts were not entirely successful. (Tr. 788-789.) Because PMA has interests that are unique from any other party in this case, the Hearing Officer violated PMA’s due process rights by excluding it from the proceedings. *See Camay Drilling*, 239 NLRB at 998.

C. The Hearing Officer Prevented PMA From Showing That The Proceeding Should Be Quashed Because The IBEW Workers Are Employed By the Port of Portland, A Public Agency, And Therefore The Board Has No Jurisdiction

The Hearing Officer conducted a four-day hearing that should never have occurred because the Board simply has no jurisdiction here. Section 10(k) of the Act allows the Board to award work in a jurisdiction dispute only where there is an alleged violation of Section 8(b)(4)(D). Section 8(b)(4)(D), by its plain terms, can be violated only where a labor

¹ The Board has recognized PMA’s unique interests by permitting it to intervene in numerous previous work assignment disputes, such as the present one, involving PMA members and ILWU-PMA collective-bargaining agreements. *See, e.g., ILWU Local 50 (Brady-Hamilton Stevedore Co.)*, 193 NLRB 266 (1971); *ILWU Local 26 (Newton Security Patrol, Inc.)*, 167 NLRB 817 (1967); *ILWU Local 13 (Princess Cruises Co.)*, 161 NLRB 451 (1966); *ILWU (Howard Terminal)*, 147 NLRB 359 (1964); *ILWU (Albin Stevedore Co.)*, 144 NLRB 1443 (1963).

organization tries to force an employer to assign work to one group of employees over another group of employees. This means, of course, that the dispute must be between two groups of “employees” under the Act. The Board has held unequivocally that a Section 10(k) notice of hearing must be quashed where the workers performing the disputed work are not statutory employees. *See, Local 326, Int’l Broth. of Teamsters*, 194 NLRB 594 (1971).

That is precisely the situation here. As ICTSI acknowledged in its opening statement, “the IBEW [workers] are employed by the Port of Portland and not by ICTSI” (Tr. 22.) No one disputes that the Port of Portland is a public entity. The Act makes clear that “employer” does not include “any State or political subdivision thereof[.]” 29 U.S.C. § 2(2). *See also, IBEW Local 48, Local Union No. 3, IBEW (Eugene Iovine, Inc.)*, 219 NLRB 528, 530 (1975) (holding that Board lacks jurisdiction over state government entities). Because the Port is not an “employer” under the Act, by definition the IBEW workers themselves are not statutory employees. Accordingly, here there is no jurisdictional dispute between two groups of “employees” under the Act, and therefore the Board lacks any jurisdiction to hold a Section 10(k) hearing or issue an award. *Local 326, Teamsters*, 194 NLRB at 594.

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IV. CONCLUSION

For all the foregoing reasons, PMA respectfully requests that its appeal be granted. The Board should quash the notice of Section 10(k) hearing in its entirety because it lacks jurisdiction under the Act. If the Board decides not to quash the proceeding, the record should be reopened and PMA should be permitted to present evidence and argument before the Hearing Officer.

Respectfully submitted this 12th day of June 2012

/s/ Charles I. Cohen

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CERTIFICATE OF SERVICE

This certifies that today I electronically filed the foregoing document and served it by
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